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SUPREME COURT OF THE STATE OF WASHINGTON  
CLERK

(Court of Appeals No. 33446-1-II)

CITY OF OLYMPIA, a Washington municipal corporation,

Petitioner,

v.

AMERICAN SAFETY CASUALTY INSURANCE COMPANY,  
foreign corporation,

Respondent.

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SUPREME COURT  
STATE OF WASHINGTON  
2007 SEP 20 P 3:02  
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AMICI CURIAE BRIEF OF WASHINGTON STATE ASSOCIATION  
OF MUNICIPAL ATTORNEYS AND THE ASSOCIATION OF  
WASHINGTON CITIES IN SUPPORT OF PETITIONER

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A. IDENTITY OF AMICI CURIAE

Amici are the Washington State Association of Municipal Attorneys (hereinafter WSAMA) the organization of municipal attorneys representing the cities and towns across the State, and the Association of Washington Cities (hereinafter AWC) the organization of the cities and towns of this State, (hereinafter collectively Amici).

B. STATEMENT OF CASE

Amici, WSAMA and AWC reference and incorporate herein the Statements of the Case as set forth in the pleadings of the Petitioner, City of Olympia, relative hereto.

C. SUMMARY OF ARGUMENT

The Petitioner asks this Court to review the Court of Appeals decision in *American Safety Casualty Insurance Company v. City of Olympia*, 133 Wn. App. 649, 137 P.3d 865 (2006) – (Court of Appeals of Washington, Division 2 [No. 33446-1-II]). This case deserved review, not only because it departs from this Court's decision in *Mike M. Johnson Inc. v. County of Spokane*, 150 Wn.2d 375, 78 P.3d 161 (2003), but because it creates an environment where settlement discussions are discouraged.

The Court of Appeals decision in *American Safety Casualty Insurance*

*Company* creates a dilemma for all cities and public entities that are required to bid public works projects. Because the Court of Appeals decision in *American Safety Casualty Insurance Company* departed from this Court's ruling in *Mike M. Johnson* so as to disregard the high standard relating to whether the public agency waived its contract defenses, it poses an impediment for public agencies who face contract disputes. If, per the Court of Appeals decision, a willingness to negotiate/discuss settlement is to be construed as presenting a factual question of waiver (notwithstanding repeated written statements that the public agency is not waiving its contract defenses), the public agency cannot afford to negotiate or discuss settlement of contract disputes lest that is construed as evidence of waiver. Particularly where the measure of waiver should be what the party intends, the decision of the Court of Appeals is all the more perplexing in that it ignores the evidence of the party whose intent is supposed to control on whether "conduct" is sufficient to show an intent to waive.

D. ARGUMENT

Amici commend the City of Olympia on its well reasoned brief and submit that the issues argued therein warrant this Court's review and also warrant reversal of the Court of Appeals decision. Amici do not intend to

repeat all of Olympia's well reasoned arguments. However, Amici submit that the Court of Appeals decision in this case, as it currently stands, will affect how every public agency in this state contracts on public projects, and how they do business with the contractors, including how or whether the public agencies will (can afford to) enter into settlement negotiations with their contractors when disputes arise.

The fundamental issue, from Amici's perspective, is whether a contractor must show facts of an unequivocal waiver by the public agency of a contract claim provision in order to defeat the agency's summary judgment motion based upon the contract and based upon the pivotal case, *Mike M. Johnson Inc. v. County of Spokane*, 150 Wn.2d 375, 78 P.3d 161 (2003). Alternatively worded, the question must be asked whether a public agency's willingness to enter into settlement discussion with a contractor waives the agency's ability to assert its contractual defenses, especially where the only correspondence from the public agency is expressly contrary to that waiver. In this case, it is particularly perplexing for the Court of Appeals to have reached its decision about whether Olympia may have unequivocally waived its right to assert contract defenses where Olympia, the entity entitled to decide whether to waive or not, was emphatic that it was not waiving its rights. This is perplexing because not only did the Court of Appeals apply a

previously non-existent standard of construing a willingness to negotiate settlement as the basis for potentially showing unequivocal waiver, in doing so it ignored the repeated and express communication by Olympia refuting waiver.

Where the law makes it clear that the public agency, in this case Olympia, is *the* entity entitled to decide whether to waive its contract defenses, the deference given to the Respondent's arguments by the Court of Appeals was greatly misplaced. It should be Olympia and its clear communication reserving its defense rights that should control this "factual" question.

From a practical perspective, the Court of Appeals decision also imposes a chilling effect on prospective negotiations where contract disputes may exist. A public agency cannot afford the risk of discussing settlement negotiations with a contractor if courts were to construe such discussion as making ambiguous the question of whether or not the public agency waived its contractual defenses, in spite of express communications to the contrary. In the case at hand, Olympia repeatedly reserved its rights under the contract during the construction and during Olympia's efforts to resolve its dispute with its contractor throughout its negotiations. Olympia sent Katspan two letters during the project that contained express reservations of rights and

referred to the specific contract claims provisions CP 326-27, 337-38. Olympia also sent two letters expressly confirming its reservation of rights after the project was complete, as the parties attempted to negotiate. CP 354, 370. Notwithstanding these four separate letters whereby Olympia sought to expressly reserve its rights to its contractual defenses, the Court of Appeals nevertheless opined that waiver was a question of fact, defeating the lower court's summary judgment.

As noted by this Court in the *Mike M. Johnson* case, procedural contract requirements must be enforced unless the benefiting party waives them or the parties agree to modify the contract. *Mike M. Johnson*, 150 Wn.2d at 386-87. That case also held that a party that benefits from a contract's provision may waive that provision, *Id.* at 391, and waivers may be implied by a party's conduct, *but* "waiver by conduct" requires unequivocal acts of conduct evidencing an intent to waive. *Id.* at 391 (*quoting Absher Construction Company v. Kent School District* 415, 77 Wn. App 137, 143, 890 P.2d 1071 (1995)). Here, there was no evidence of an unequivocal waiver.

It is hard to understand how the Court of Appeals reached its conclusion since the only expressed communication from Olympia was contrary to waiver. The Court of Appeals decision means that almost any

conduct concerning a claim would amount to waiver of contractual defenses. Certainly, this is how public entities would need to approach a claim when potential contractual defenses exist. Since the conduct that seems to be suggested as the basis of waiver was the Olympia's willingness to discuss settlement, the Court of Appeals must have concluded that this conduct amounted to unequivocal acts evidencing an intent to waive. However, not only was there nothing in this conduct evidencing an intent to waive, the clear communication throughout the course of handling Katspan/American Safety's claim was that Olympia *was not waiving* its contractual defenses. Again, there was no evidence of unequivocal waiver.

Olympia repeatedly asserted its reservation of the right to its contractual defenses, and the only apparent basis for the Court of Appeals' conclusion that there may have been an unequivocal waiver of those contract defenses was that Olympia entered into negotiation discussions with its contractor. According to the clear and longstanding standard articulated by this Court in *Mike M. Johnson*, Olympia did not waive its rights, particularly where waiver by conduct requires unequivocal acts of conduct evidencing an intent to waive.

Under Washington law, parties to a publicly bid contract are required to pursue their delay damage claims in accordance with applicable contractual

notice procedures *unless those procedures are waived. Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 386, 78 P.3d 161 (2003); *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 77 Wn. App. 137, 142, 890 P.2d 1071 (1995). As American Safety has conceded, neither Katspan nor American Safety followed the contractual notice procedures in this case. The only issue remaining to American Safety in these regards was whether Olympia waived these procedures. Along with that, by the clear, and long-standing standard articulated by this Court in *Mike M. Johnson*, the Court of Appeals ruling is incorrect. That court set aside the trial court's ruling, relying on a purported issue of fact, but that "fact" was immaterial, and could not serve as the basis for overturning summary judgment in this matter.

The standard of review on summary judgment is well settled. *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000). The appellate court engages in the same inquiries as the trial court, determining whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Id.* The court considers all facts and reasonable inferences from them in the light most favorable to the nonmoving party, and " '[t]he motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.' " *Id.* (quoting *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993)). Bare assertions that a genuine material issue exists, however, will not defeat a summary judgment motion in the absences of actual evidence. *Id.*

*Mike M. Johnson*, at 386.

Under this standard, the proper inquiry in this matter is whether

Olympia *unequivocally* waived its right to have Katspan/American Safety comply with claim procedures and deadlines. Even taking the facts in the light most favorable to American Safety, there is *no* evidence of unequivocal waiver.

While quoting this Court's ruling in *Mike M. Johnson*, the Court of Appeals turns to a Division I case predating *Mike M. Johnson* by over thirty years to establish a rule which looks similar to this Court's standard, but which in application is its exact opposite.

[w]aiver becomes a question of fact for the jury when the party seeks to prove it by using various forms of evidence such as declarations, acts, and nonfeasance. *Reynolds Metals Co. v. Electric Smith Const. & Equipment Co.*, 4 Wn. App. 695, 700-01, 483 P.2d 880 (1971) (*quoting Alsens American Portland Cement Works v. Degnon Contracting Co.*, 222 N.Y. 34, 37, 118 N.E. 210 (1917)). And that kind of evidence creates different inferences that do not "directly, unmistakably or unequivocally establish [waiver]." *Reynolds*, 4 Wn. App. at 700, (*quoting Alsens*, 222 N.Y. at 37). In short, "[w]hen facts proved without dispute require the exercise of reason and judgment, so that one reasonable mind may infer that a controlling fact exists and another that it does not exist, there is a question of fact." *Reynolds*, 4 Wn. App. at 701 (*quoting Alsens*, 222 N.Y. at 37). The burden of proof rests with the party claiming waiver. *Jones v. Best*, 134 Wn.2d 232, 241-42, 950 P.2d 1 (1998).

*American Safety Cas. Ins. Co. v. City Of Olympia*, 133 Wn. App. 649, 657, 137 P.3d 865 (2006). Thus, *Reynolds* discussed the difficulty of proving waiver as a matter of law, as opposed to proving the absence of waiver as a

matter of law. For the former, under *Reynolds*, all a party needs to do to create an issue of fact is to show that it took some action inconsistent with waiver, and the issue must be taken to the jury. For the latter, which is the issue presented here, a party (American Safety) must show that *all* the actions taken by the other side (Olympia) evidenced an intent to waive. *Reynolds* did not discuss this latter issue. *Mike M. Johnson* did, and is controlling here. Olympia did not “unequivocally waive” its rights under its contract any more than did Spokane county in *Mike M. Johnson*.

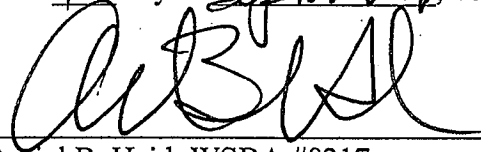
Olympia did a yeoman’s job of illustrating the factual parallels between this case and the *Mike M. Johnson* case, and as with that case, there was no waiver of the contract defenses. Again, the willingness of Olympia to negotiate settlement, while expressly preserving its defenses, cannot reasonably be the basis of a genuine issue of material fact when the correct standard of unequivocal waiver is applied.

E. CONCLUSION

For all of the reasons set forth above, and those presented by the Petitioner, Amici, Washington State Association of Municipal Attorneys and Association of Washington Cities, respectfully request that this Court review and reverse the Court of Appeals decision in *American Safety Casualty*

*Insurance Company v. City of Olympia*, 133 Wn. App. 649, 137 P.3d 865 (2006), reaffirming its holdings in *Mike M. Johnson Inc. v. County of Spokane*, 150 Wn.2d 375, 78 P.3d 161 (2003).

Respectfully submitted this 10<sup>th</sup> day of September, 2007.

A handwritten signature in black ink, appearing to read 'Daniel B. Heid', written over a horizontal line.

Daniel B. Heid, WSBA #8217

Auburn City Attorney

for Amici, Washington State Association of  
Municipal Attorneys and Association of  
Washington Cities

No. 79001-9

SUPREME COURT OF THE STATE OF WASHINGTON  
(Court of Appeals No. 33446-1-II)

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CITY OF OLYMPIA, a Washington municipal corporation,

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AMERICAN SAFETY CASUALTY INSURANCE COMPANY, a  
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MOTION OF THE WASHINGTON STATE ASSOCIATION OF  
MUNICIPAL ATTORNEYS AND THE ASSOCIATION OF  
WASHINGTON CITIES FOR LEAVE TO FILE BRIEF IN  
SUPPORT OF PETITIONERS' PETITION FOR REVIEW

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State Association of Municipal Attorneys  
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1. IDENTITY OF MOVING PARTY

The moving parties are the Washington State Association of Municipal Attorneys, a not-for-profit corporation, lawfully organized under the laws of the state of Washington, representing the attorneys for Washington's cities and towns, and the Association of Washington Cities, a non-profit, non-partisan corporation that represents Washington's cities and towns, (hereinafter collectively Amici) through applicant Daniel B. Heid, City Attorney for the City of Auburn, Washington.

2. STATEMENT OF RELIEF SOUGHT

Amici seek permission to file an Amici Curiae Brief in support of the Petitioner's Petition for Review in the above matter, pursuant to R.A.P. 10.6, and Amici seeks permission to submit further briefing and present limited oral argument, pursuant to R.A.P. 11.2(b), if review is granted.

3. FACTS RELEVANT TO MOTION

(a) Interest of Amici.

Amicus Washington State Association of Municipal Attorneys is a Not-For-Profit Corporation and its membership is made up of attorneys for most of the cities and towns in the State of Washington, and Amicus Association of Washington Cities is a non-profit, non-partisan corporation

that represents Washington's cities and towns. Washington has 281 cities and towns, ranging from Seattle at over half a million citizens to Krupp, with a population of about 60.

The applicant, Daniel B. Heid, has previously represented and worked for a variety of municipalities of various sizes and geographic locations across the State of Washington, including Lewis County and the cities of Chehalis, Sunnyside, Toppenish, SeaTac, Lakewood and now Auburn.

As with essentially all cities and towns across the State, the jurisdictions with which the applicant presently is and has previously been affiliated have been involved in publicly bid contracts and public works contracts. The issues that are involved in the case now before this Court are important to and could affect any such cities and towns.

Applicant, Daniel B. Heid, is a past president of the Washington State Association of Municipal Attorneys, and continues to be involved in functions and activities for and on behalf of the Washington State Association of Municipal Attorneys and the Association of Washington Cities, and continues, as well, to be active on various boards and committees of the Washington State Association of Municipal Attorneys and the Association of Washington Cities. Applicant, Daniel B. Heid, further, continues to stay abreast of issues of importance to all cities and towns in this state.

(b) Applicant's Familiarity with the Issues and the Scope of Argument to be Presented by the Parties.

The applicant has reviewed the pleadings filed by the parties in the Supreme Court as well as those filed in the lower courts. The applicant has further reviewed and researched the issues raised by the parties. The applicant has litigated issues relating to similar issues in various judicial forums, and the applicant submits that he is aware of the concerns of other municipal attorneys and of other cities regarding the responsibilities and concerns flowing from forcing municipal employers both to fund industrial insurance for police and firefighters and the exposure to potentially unlimited liability in common law actions brought by the same police/fire employees.

(c) Specific Issue to which Amici Curiae Brief will be Directed.

The applicant will address the fact that the Court of Appeals decision in *American Safety Casualty Insurance Company v. City of Olympia*, 133 Wn. App. 649, 137 P.3d 865 (2006), creates a dilemma for all cities and public entities that are required to bid public works projects. Because the Court of Appeals decision in *American Safety Casualty Insurance Company* departed from this Court's ruling in *Mike M. Johnson Inc. v. County of Spokane*, 150 Wn.2d 375, 78 P.3d 161 (2003), so as to disregard the high standard relating to whether the public agency waived its contract defenses, it

poses an impediment for public agencies who face contract disputes. If, per the Court of Appeals decision, a willingness to negotiate/discuss settlement is to be construed as presenting a factual question of waiver (notwithstanding repeated written statements that the public agency is not waiving its contract defenses), the public agency cannot afford to negotiate or discuss settlement of contract disputes lest that is construed as evidence of waiver. Particularly where the measure of waiver is (is supposed to be) what the party intends, the decision of the Court of Appeals is all the more perplexing in that it ignores the evidence of the party whose intent is supposed to control on whether “conduct” is sufficient to show an intent to waive.

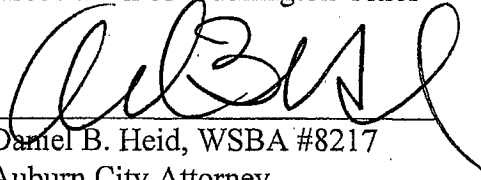
(d) Applicant’s Reason for Believing that Additional Consideration is Necessary on this Specific Issue.

The decision of the Court of Appeals affects all cities and towns. The Petitioners and Respondents have concentrated on their particular facts and issues in the cases before the Court as they relate to their specific concerns.

However, again, the issue involved affects all cities and towns in the state. The full scope of the impacts of this decision warrants the perspective of more than just one municipality. Allowing participation from Amici will provide the Court with a broader perspective regarding the related issues and ramifications faced by cities and towns across the state.

Respectfully submitted this 10<sup>th</sup> day of September, 2007.

Attorney for Amici, Washington State  
Association of Municipal Attorneys and  
Association of Washington Cities



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